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WM. M. ESTES, *Appellant*,

vs.

RICHARD A. SIMMONS, *Appellee*.

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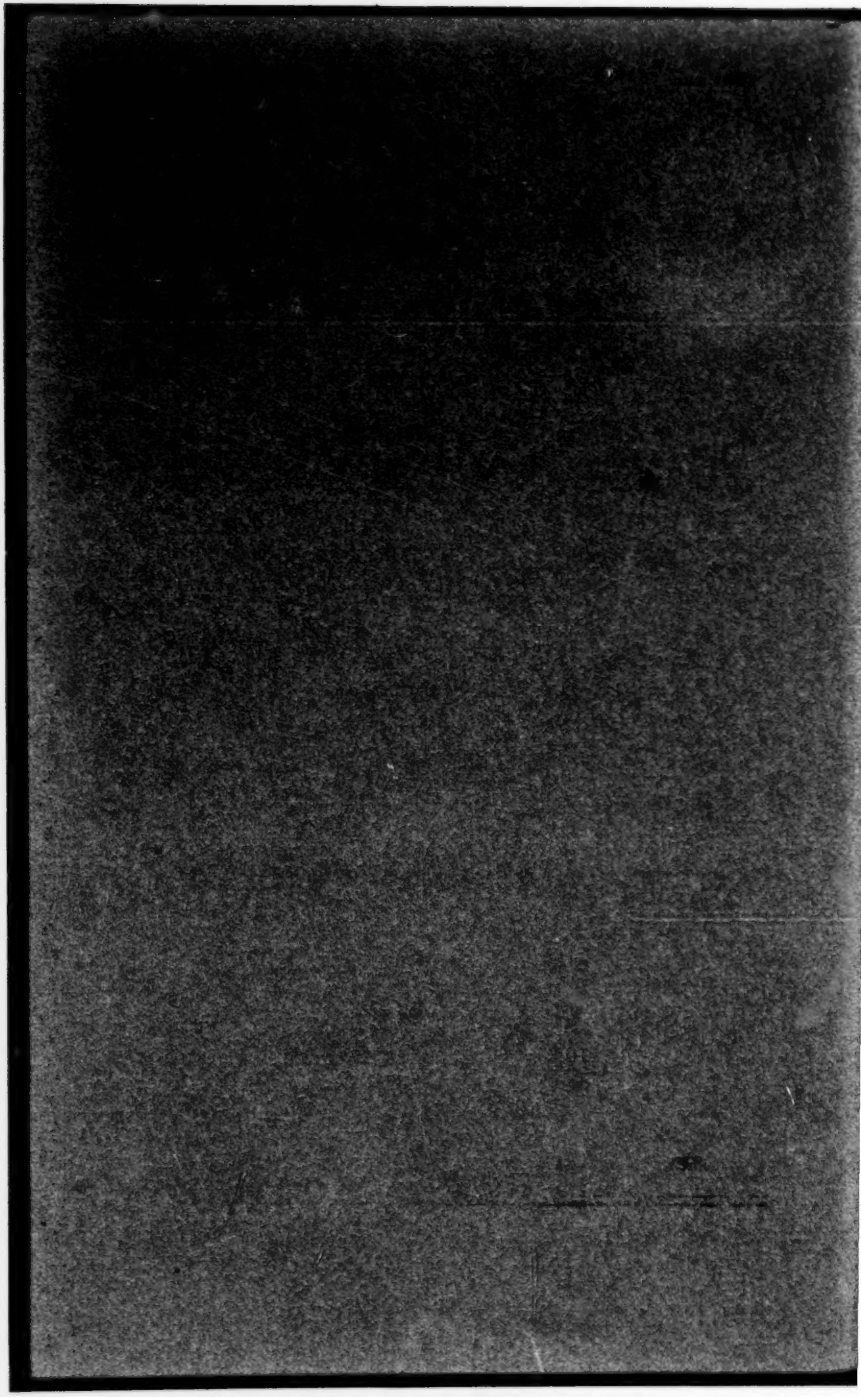
S. B. LUCKETT,
Attorney for Appellant.

[redacted]



IN THE

Supreme Court of the United States.

WM. M. ESTES,
Appellant,
vs.
RICHARD A. TIMMONS,
Appellee.
No. 74.

BRIEF AND ARGUMENT FOR APPELLANT.

Statement of Case.

This case comes up on appeal from the decision of the Supreme Court of Oklahoma, rendered June 6, 1903 (Record, 139).

The proceedings in the case are stated with substantial accuracy in the opinion of the Court below, beginning at page 140 of the Record. Estes, plaintiff below, filed his petition in Equity in the District Court of Pottawotomie Co., Oklahoma, seeking to declare a trust as against Timmons, defendant below, as to the S. ½ of the S. E. ¼ of Sec. 18, T. 10 N., R. 4 E., in said county.

In his petition (Record, p. 8), Estes declares that said land was a part of the Sac and Fox reservation in the Territory of Oklahoma, which was thrown open to settlement and entry on Sept. 22, 1891, under the proclamation of the

President of the United States, issued Sept. 18, 1891 (27 Stats., 989). It is further shown that plaintiff, being qualified, settled on said land within a few minutes after the hour of opening. On Sept. 25, 1891, he made homestead entry thereof. Thereupon, the defendant and appellee, Timmons, contested this entry in the local land office, alleging that he, Timmons, had settled on said tract prior to the settlement of Estes, and on a hearing had, it was held by the Register and Receiver of the local land office at Oklahoma City, Oklahoma, that said Timmons was, in fact, the prior settler, and, as a result, appellant's entry was cancelled, and appellee was allowed to enter the land; that pending this first contest, this appellant filed his contest affidavit against appellee, alleging that said appellee was not qualified to make a homestead entry on said lands for the reason that he had entered upon and occupied this identical land and other parts of the reservation then opened to settlement prior to noon of Sept. 22, 1891, and after Sept. 18, 1891; that said contest resulted in a decision by the local officers in favor of the said Timmons, it being alleged in the sixth paragraph of the petition "that upon said hearing and trial said defendant wilfully, intentionally and fraudulently, intending to deceive and mislead and misinform said register and receiver, procured and introduced the testimony of witnesses, W. L. Hartman, Clarence Hartman, Sam Cole, David L. Timmons, John Eaton and H. W. Darrow, who at the instigation and procurement of the said defendant testified before said register and receiver, in substance and effect, that the said defendant did not enter upon or occupy any of said lands so opened to settlement as aforesaid before 12 o'clock noon of Sept. 22nd, A. D. 1891, and subsequent to Sept. 18th, A. D. 1891, and to the effect that they were with said defendant during said period and all of the same; which said testimony was false, and known by said

defendant to be false when he procured and introduced the same."

It is further alleged that by reason of said fraudulent action and imposition on the part of the said Timmons, the Commissioner of the General Land Office and the Secretary of the Interior were induced to and did hold that the said Timmons was duly qualified to make entry of said land, and by reason thereof said contest was finally decided against this appellant. A certified copy of all the testimony submitted in the case on both sides is made a part of the petition, together with the proceedings had at the local office.

Later, appellant, by leave of the District Court, was allowed to amend the seventh paragraph of his petition, the amendment beginning at page 115 of the Record. Therein it is alleged that after the testimony was taken in the contest, and before any decision had been rendered by the Register and Receiver, appellant filed with said local officers his motion to reopen the hearing in said contest for the purpose of introducing further testimony, which motion was supported by affidavits attached thereto; that the local officers overruled said motion, and rendered their decision, as stated, against appellant, and in favor of appellee, and that thereupon appellant filed his motion for a new trial in said case, supported by affidavits (to be referred to hereafter), showing the absolute falsity of certain evidence introduced by the defendant, Timmons. This motion was also overruled by the local officers, and upon successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior this action of the local officers on said motion was sustained.

In the opinion of the Court below, beginning at page 142 of the Record, the sixth and seventh paragraphs of the original bill are quoted at length, with no reference whatever to said amendment, indicating, it would seem, that the Court

overlooked the force and effect of the amendment to the original petition.

A demurrer was filed to the amended bill which was sustained by the District Court, and upon plaintiff's refusal to further amend, judgment was rendered against him by the Court (Record, p. 131).

From this judgment appeal was taken to the Supreme Court of the Territory in due form, resulting, as stated, in the decision set forth in the Record, beginning at page 139.

The Questions Presented by the Record.

In accordance with the provisions made in the Act of Congress, approved March 3, 1891 (26 Stats., 989, Sec. 16), the President, on September 18, 1891, issued his proclamation opening the Sac and Fox Reservation. In this proclamation was inserted the following paragraph (27 Stats., 992):

> "Notice, moreover, is hereby given that it is by law enacted that until said lands are opened to settlement by proclamation, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall be permitted to enter any of said lands, or acquire any right thereto. The officers of the United States will be required to enforce this provision."

The effect of the construction given to this provision of the proclamation by the Land Department is to hold that the issuance of the proclamation closed the lands to which it applies until noon of September 22, 1891, making presence within the limits of those lands a disqualification in accordance with the general provisions of the Act of March 2, 1889 (25 Stats., 1004).

From a reading of the opinion of the Territorial Supreme Court it would seem that it was thought by the Court that

appellant's petition failed to set forth fully the facts on which he based his allegation that the decision of the Land Department, in favor of Timmons, had been procured by fraud and by false testimony. It is said (Record, p. 143):

> "The only allegation of fraud in this petition is the statement that the witnesses named, testifying on behalf of defendant, Timmons, testified falsely—in short, committed perjury—and the further allegation that the plaintiff was then unable to disprove their statement. Whether he would now be able to refute the same does not appear; nor does it appear that there was not sufficient truthful evidence to sustain the decision of the Land Department."

And again, on the same page:

> "The only wrong complained of is the fact that the Register and Receiver, and after them the Commissioner and the Secretary of the Interior, chose to believe the seven witnesses testifying on the part and in behalf of defendant, Timmons, rather than the three testifying for plaintiff, Estes."

We submit, with the utmost respect for the ability of the Court below, that by the failure to consider the amendment to the original petition of the appellant, the Court failed to appreciate the real nature of appellant's cause of action. This is not a case involving the question of the credibility of the witnesses whose testimony is set out in the record, nor the weight of the evidence introduced by the respective parties. If it were that kind of a case, it would not be here.

The record shows that at the hearing in the contest, Estes introduced witnesses who testified positively to facts which show that Timmons was inside of the Sac and Fox Reservation at least three days prior to September 22, 1891, and that just prior to that time he had been on this identical tract of

land. (See testimony of Adair, p. 52, and J. W. Boling, p. 62.)

A number of witnesses, including Timmons himself, testified in his behalf. Among these witnesses was one, John Eaton, whose testimony was taken by deposition (Record, p. 38). This witness testified (39) that he had traveled with Timmons from September 19, 1891, from a point in old Oklahoma, in a wagon, to a point within three-quarters of a mile west of the west line of the Sac and Fox country, where he left Timmons about 4 p. m., September 21. One of the affidavits upon which appellant's motion for new trial was based was an affidavit by this same Eaton, set forth in the Record, beginning page 121, in which he swears in great detail to the effect that he was not even in Oklahoma at all at the time of the Sac and Fox opening, but had reached his old home in Kentucky just before the opening, having gone there in a wagon and having spent over a month on the way. This affidavit of retraction made by Eaton is supported by affidavits which were also filed with the motion for new trial, executed in Kentucky by his brother, J. W. Bishop (Record, p. 131) and his nephew, Wm. Knight (Record, 132), and the testimony of Mrs. Cassie Rogers (Record, p. 106), formerly the wife of John Eaton, from which affidavits and testimony it appears conclusively that Eaton's affidavit of retraction was true and that he was not in Oklahoma at the time of the Sac and Fox opening, and that he was not with Timmons at 4 o'clock on the day before the opening, outside of the line, and that therefore, his testimony given at th hearing was absolutely false.

The importance of the above facts will be at once observed when the testimony of the appellee, Timmons, at the hearing, is read, beginning at page 79, of the Record. He testified to his alleged movements during the four or five days preceding September 22, 1891, the date of the Sac and

Fox opening. On page 81, of the Record, he testified as follows:

> "Q. Do you know one Johon Eaton?
> A. I am slightly acquainted with him.
> Q. Did you see him at any time before the opening of the Sac and Fox country? If so, when was the last time you saw him before the opening?
> A. The last time I saw him was about 4 o'clock in the afternoon, September 21."

On cross-examination (pp. 84, 85), he testified:

> "Q. When you arrived at Choctaw City, what did your party consist of, horses, wagons and persons?
> A. Consisted of one lumber wagon, four horses, Samuel Ferguson, John Eaton, H. W. Darrow and myself."

Again, on page 86:

> "Q. Who was with you at this point a mile northwest of Choctaw City, on the evening of the 19th and the morning of the 20th?
> A. H. W. Darrow, Sam Ferguson, John Eaton and myself."

On page 87 he testified that his party, after crossing the North Canadian River, traveled southeasterly through the Kickapoo country to a point within three-quarters of a mile from the Sac and Fox line where, he says, they camped on September 21, 1891. On page 88 he testified:

> "Q. Did you meet anybody on your trip from Little River Falls up to the point three-quarters of a mile from the Kickapoo line that you were acquainted with at that time, or became acquainted with at any time?
> A. At Little River Falls Mr. Ferguson came into camp. I knew him in Iowa. Mr. John Eaton and he were together, and I got slightly acquainted with Mr. Eaton."

It will be seen that Timmons committed himself irrevocably to the fact that John Eaton was a member of his party from the evening of September 19, until the afternoon of September 21, and that he then left the party. If Eaton was not in Oklahoma Territory at that time, these statements of Timmons were false and were introduced by him into his testimony in order to pave the way for the false testimony of Eaton.

The case for Timmons in this contest was not as strong as the Court below seemed to think. The seven witnesses referred to in the opinion of the Court with the page of the Record at which their testimony begins, are presumably the following: W. L. Hartman (12), Clarence Hartman (18), Sam Call (24), John F. Hartman (27), H. W. Darrow (32), John Eaton (38), David S. Timmons (44). The three Hartmans claimed to have met Timmons on the line of the Sac and Fox land about 8 a. m., September 22, 1891, and to have been with him up to the hour of opening. Each one admitted that he did not know anything as to the whereabouts of Timmons prior to the morning of September 22.

Sam Call testified that he traveled with Timmons from Norman to the line, having left Norman on the evening of September 20, and arrived at the stopping place on the evening of September 21, 1891, while Timmons himself swears that they came to Norman on September 18, left there that day, and by the morning of September 20, they were three miles northwest of Choctaw, and nowhere mentioned Call as in his party (Record, p. 80).

H. W. Darrow testified (Record, p. 33), that he left Norman on the afternoon of September 18, in company with Timmons, and other parties, describing their movements about as Timmons, and then said:

> "We moved our camp the morning of the 22nd, up on to the line; we remained there until 12 o'clock noon,

> central standard time, and we made the run at 12 o'clock sharp. I remember that there was Sam Ferguson, *John Eaton*, Richard A. Timmons and myself, from Little River Falls to our camp near the Sac and Fox line, then were joined by John Hartman at 8 o'clock in the morning of the 22nd, Clarence Hartman, Sam Call, and Ed. Spencer, John W. Boling, Ote Adair and D. S. Timmons, there were all present that I knew."

And yet Timmons himself, as we have shown, testified that Eaton left his company on the afternoon of September 21, and he knew nothing about him after that (Record, p. 89). Call swears he was with the Timmons party from Norman and Eaton showed he was not in the Territory at all.

D. S. Timmons, a son of the appellee, testified to his father having started from Norman for the Sac and Fox line, but that he, the witness, was not with him during the entire journey, but says he went into his father's camp on the evening of September 21, and was with him until the hour of opening.

It will be seen that the point sought to be established by this testimony was that on the morning of the day of opening, Timmons was at the line. The "seven witnesses" do not account for his whereabouts between September 18 and September 22, except as to the witnesses Darrow and Eaton. The latter's testimony was retracted, and the former's is false, if Eaton was not in the Territory. Ferguson was not called as a witness nor his whereabouts accounted for.

The decision of the local officers on this kind of a case is set out in the Record at page 112. They found, among other things, as follows (Record, p. 113):

> "The plaintiff introduced several witnesses to show the disqualification of the defendant, but they all failed to positively testify that they saw the defendant within said country during the said prohibited period."

It was because of the above conclusion as to the evidence of contestant, apparently, that the local officers held that the showing for new trial was insufficient. And yet at least two witnesses, Adair and J. W. Boling, mentioned above, had testified positively that the appellee, Timmons, was within the lands to be opened, on September 19, 20 and 21, in a camp a short distance southeast of the identical tract involved in this case. (See testimony of Adair, Record, p. 53, 54, and on cross-examination, bottom of p. 58; testimony of J. W. Boling, Record, p. 62, 63, 64.)

The record made at the hearing of the contest of Estes *vs.* Timmons, having been incorporated by reference into the petition of Estes, in the District Court, everything that is shown in the Record must be taken into consideration in determining the correctness of the decision appealed from. This Record shows that after the hearing was closed at the local office and before any decision was rendered by the Register and Receiver, the contestant, Estes, laid before those officers, very promptly, the facts disclosed in the affidavit of John C. Eaton (Record, p. 46). Eaton's testimony (Record, p. 38), was taken September 26, 1898, by deposition before a Notary Public. On January 24, 1899, he made the above affidavit in which he states what he says were the efforts made by Timmons to induce him, Eaton, to testify in behalf of Timmons, saying that Timmons suggested the story he was to tell about the same as he had told it in his deposition. This affidavit was filed in the local office on January 26, 1899 (Record, p. 48), and on January 28, 1899, Estes filed his application to reopen the case, accompanied by the affidavit of G. W. Adams, his attorney before the local office (Record, p. 116). In this affidavit Mr. Adams says:

> "That if the said cause is reopened, contestant will be able to prove by the said John Eaton, J. W. Bishop and J. H. Bishop, that the said John Eaton was not in

the Territory of Oklahoma, but in the State of Kentucky on the 21st day of September, 1891. And that said contestant will be able to prove by John F. Hartman, W. L. Hartman and Clarence A. Hartman, as this affiant is informed and believes that the said Sam Call, who swore on behalf of Timmons, that he was with Timmons until about 8 o'clock on the 22nd day of September, 1891."

As already stated, the local officers declined to reopen the case, and on February 1, 1899, rendered their decision (Record, p. 112).

Thereafter, on March 4, 1899, Estes, by his said attorney, filed his motion for new trial, as stated (Record, p. 119). This motion was supported by an affidavit made by Eaton (Record, p. 121), in which he states the facts much more fully than in his first affidavit, but to the same effect, namely, that in the latter part of July, or the first of August, 1891, he and his then wife, Cassie, started in a wagon from Sapulpa, Oklahoma, to Whitley County, Ky., where they arrived about September 15 or 16, 1891, on a visit to his relatives, and remained until February, 1892, when they returned to Oklahoma. The affidavits of J. W. Bishop (Record, p. 131), and Wm. Knight (Record, p. 132), as already stated, fully corroborate Eaton's affidavit. This motion for new trial or rehearing was overruled.

Taking the entire petition as amended, looking to the facts incorporated into it in the record of the contest, we submit that it makes a case very strong on the face of the pleading on the following propositions:

1. It shows that Timmons obtained the decision of the local officers and the affirmance thereof, not only by false and perjured testimony of his witnesses, but that he, himself, necessarily committed perjury in his own testimony.

2. That upon the case made, it is shown that it was the

duty of the officials of the Land Department to further investigate the charges made against Timmons by Estes in the interest of the United States as well as of Estes himelf.

Questions of Law Presented.

I.

For the appellant it is frankly conceded that the several tribunals of the Land Department are made special tribunals vested with quasi-judicial authority to determine facts as between conflicting claimants to the same tract of public land and that the findings of facts upon contradictory testimony, by these tribunals, are conclusive not only in the Land Department, but also upon the Courts. If the case at bar were the kind of case that the Oklahoma Supreme Court seemed to consider it, simply a case of the weight of evidence, there could be no possible doubt but that the decision below should be affirmed. But the case made by appellant's petition in the District Court is not that kind of a case.

II.

This is not a case involving simply conflicting claims to the same tract of land. The charges made in the contest of Estes *vs.* Timmons, are, primarily, charges in which the United States is interested, being a charge of disqualification against Timmons. Of course, if Estes could sustain this charge he would expect to profit by the same, not as a successful contestant under Section 3, of the Act of May 21, 1880, but as an actual settler residing on the land who would have the right of entry, as a settler, for three months, under Section 2265, U. S. R. S., if Timmons' claim should be rejected by the Land Department.

We say the Government was primarily interested in this contest. Such we understand to be the force of the rule laid

down by this Court in the case of Knight *vs.* United Land Association, 142 U. S., 161, in which the Court, speaking through Mr. Justice Lamar, said, in reference to the duties of the Secretary of the Interior as the head of the Land Department:

> "The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted or is disposed of to a party not entitled to it. He represents the Government, which is a party in interest in every case involving the surveying and disposal of the public lands."

The United States is so far interested in keeping the title to a tract of public land within the jurisdiction of the Land Department until the question as to who is entitled to a patent has been properly determined that suit will be brought in the name of the United States to vacate a patent improvidently issued before the Department has fully determined this question (Germania Iron Co. *vs.* United States, 165 U. S., 379; Williams *vs.* United States, 138 U. S., 514).

And cases of this kind have even gone to the extent of recognizing the right of a party whose claim to a tract of public land had not been fully determined by the Land Department, to go into the Courts himself to maintain his claim as against the party to whom patent had issued (Duluth & Iron Range R. R. Co. *vs.* Roy, 173 U. S., 587).

It is true that in each of the three cases cited above, patent was inadvertently issued by officials in the General Land Office while contests were pending in the Department to determine the relative rights of conflicting claimants to the land. It was held by this Court in the first two cases, that the United States had sufficient interest in the proper disposal of the title to maintain suit to vacate a patent so issued. In the

third case, that of R. R. Co. *vs.* Roy, *supra,* this Court went further and held that the Courts might inquire directly into the question as to which of the two conflicting claimants was entitled to the land. In that case, the patent was not vacated in order that the jurisdiction of the Land Department might be restored and the contest proceedings continued to the end, but the decision of the District Court of Minnesota quieting title to the land in Roy as against the patent issued to the State of Minnesota, pending Roy's contest, was affirmed by the State Supreme Court and on the case being brought by writ of error to this Court, the judgment of the State Supreme Court was affirmed.

While the exact conditions which obtained in those cases do not appear in the case at bar, so far as the issuance of patent before the contest was finally adjudicated by the Land Department, still we apprehend that the principle sustained by those decisions applies here with great force. Estes showed beyond any controversy that the judgment in favor of Timmons was procured not only by false testimony on the part of witnesses who were examined for Timmons, but that Timmons himself committed direct perjury in his own testimony. Notwithstanding this, the several tribunals of the Land Department refused to give Estes any opportunity to establish these facts by reopening the contest for that purpose and the correctness of this action is a matter which the Courts have the power and the right to review.

III.

In a case like this the Courts will look into the record of the proceedings had in the Land Department, not for the purpose of ascertaining whether that Department came to a correct conclusion of fact from conflicting evidence, but to determine whether or not the judgment of the Department was right and just as between the parties and not the result

of: 1. Error of law committed by the Department officials; 2. Fraud committed by the prevailing party; 3. Or imposition upon the Department officials by the prevailing party without which the decision would have been the other way.

One of the leading decisions of this Court on this proposition will be found in the case of Garland *vs.* Wynn, 20 Howard, 5, in which the Court said (quoting syllabus):

> "Courts of justice have power to examine a contested claim to a right of entry under the pre-emption laws, and to overrule the decision of the Register and Receiver, confirmed by the Commissioner, in a case where they have been imposed upon."

In the following cases, among many that might be cited, this Court has sustained the lower Courts where they have examined the entire proceeding in the Land Department, including the testimony taken in a contest case, to determine whether a patent issued and involved in the suit had been obtained rightfully or not:

> Barnard *vs.* Ashley, 18 Howard, 43;
> Lytle *vs.* Arkansas, 22 Howard, 7;
> Lindsey *vs.* Hawes, 2 Black, 554;
> Carr *vs.* Fife, 156 U. S., 494.

In the case of De Cambra *vs.* Rogers, 189 U. S., 119, the action of the lower Court in sustaining a demurrer to a cross-bill in which fraud in procuring the patent by De Cambra was alleged, this Court, by Mr. Justice Brewer, called attention to the fact that no copy of the testimony given in the contest was set up as a part of the cross-complaint and said that in the absence of the record of the evidence, as "De Cambra was informed of the nature of the wrongs he alleges, was perpetrated upon him by Rogers, it may be presumed that evidence was offered by both parties upon that question and that it was decided adversely to his con-

tention." In the case at bar, the record before the Land Department is incorporated in the petition and it affirmatively appears therefrom that the matters of imposition relied upon by Estes were brought to the attention of the Department officials, but they refused to allow his allegations of such imposition to be investigated by a further hearing.

In the leading case of Johnson *vs.* Towsley, 13 Wall., 72, the whole question of the proper procedure in cases of this kind was carefully reviewed and discussed in the opinion of Mr. Justice Miller, speaking for this Court. There it was contended by able counsel for Johnson that the older cases which we have cited above had no application to cases arising subsequent to the passage of the pre-emption law of September 4, 1841, in which, for the first time, express authority was conferred upon the local officers to decide conflicting claims to any tract of public land, their decision to be subject to successive appeals to the Commissioner of the General Land Office, and the Secretary of the Interior. (See Same Case, 20 Law Ed., 485.) This Court not only did not sustain that contention, but expressly referred to those cases as supporting the jurisdiction of the Courts to review the decisions of the Land Department, after a contest, in a proper case.

IV.

A Court of Equity will grant relief against a decision of the Land Department obtained by *imposition upon the officials of the Department*, and such imposition may consist of false swearing, subornation of perjury or any other such misconduct on the part of the successful party as defeated the ends of justice.

The scope of inquiry in a case like this is much broader than is the case in a bill of review brought in a Court of Equity to review the judgment of a Court of Law. This, we take it, grows out of the fundamental principle of our Government, which assures to every citizen protection in his

property claims by declaring that he shall be denied a claim of right only upon the judgment of a *judicial* tribunal. While it is true that the law clothes certain executive officials with judicial powers in certain cases, from the necessity of the case, such powers are always spoken of as *quasi*-judicial. Such officials do not belong to the judiciary and they do not possess the machinery and equipment, nor the sanctions which belong to a Court, so that, however honest and fair-minded they may be, personally, the presumption of a full and complete examination of a case, prior to judgment, does not attach to their decisions as it does to the decision and judgment of a Court.

In the case at bar it is alleged in the petition now under examination that the officials of the Land Department were imposed upon by Timmons by the production of false testimony for use in the hearing of the contest between these two parties. The record shows that instead of producing his witnesses before the local officers in person, Timmons took the testimony of practically all of them by deposition, upon written interrogatories, and that, with two or three exceptions, these witnesses were not cross-examined. Is this such a case of "imposition" as can be made the subject of adjudication by the Courts, after the highest tribunal of the Land Department has passed upon the case?

In all the rulings of this Court on the subject, the grounds upon which the Courts will review decisions of the Land Department are spoken of as: Error of law, fraud and *imposition*. We take it, therefore, that the term "imposition" has a distinct and separate meaning from the term "fraud" or that it specifies one particular species of fraud of which a Court might not take cognizance in a suit to review the judgment of another Court.

In Lytle *vs.* Arkansas, 22 Howard, 193, this Court said:

> "Another preliminary question is presented on this Record, namely: Whether the adjudication of the

> Register and Receiver, which authorized Cloyes' heirs to enter the land, is subject to revision in the Courts of Justice, on proof, showing that the entry was obtained by fraud and *imposition of false testimony on those officers, as to settlement and cultivation.* We deem this question too well settled in the affirmative for discussion. It was so treated in the case of Cunningham *vs.* Ashley, 14 Howard, 377; again in Barnard *vs.* Ashley, 18 Howard, 43; and conclusively in the case of Garland *vs.* Wynn, 20 Howard, 8."

And again, after examining the testimony, at the close of the majority opinion, the Court said:

> "Our opinion is, that the affidavits, on which the occupant entry was founded, were untrue in fact, and a fraud on the Register and Receiver; and that Cloyes had no *bona fide* possession as tenant of the tinner's shop, within the true meaning of the Act of 1830."

It is true that the proceedings in the above case in the local office upon which the patent was issued by the General Land Office were practically *ex parte*, but the ruling is precisely in point here, in giving definition to the term "imposition" as used in the decisions of this Court. The conclusion of the officials of the Land Department in that case was obtained by the *"imposition of false testimony* upon those officers." Of course, the term does not have a different significance when used in regard to an *ex parte* case from what it has when used in regard to a case in which a contest was had as in the case at bar. (See also Lindsey *vs.* Hawes, 2 Black, 554.)

In Carr *vs.* Fife, 156 U. S., 494, already cited, objection was made in the lower Court to the admission of the record of the proceedings had in the Land Department and upon this point this Court said:

> "But here, when the plaintiff was endeavoring, by a bill in equity, to invalidate a patent by averring mis-

> conduct on the part of the officials in the contest case, a complete record of these proceedings was not only relevant, but of the utmost importance, if the incidents attending the contest in the land office were to be at all a subject of inquiry."

And in closing the opinion, it was said:

> "Of course, in the absence of fraud and *imposition,* the findings and decision of the land office cannot be reviewed as to the facts involved, and the Court below would not have been warranted in interfering with the title of the patentee and his vendees."

Other cases might be cited more or less clear upon this precise point, but we take it that these are sufficient to show that this Court recognizes the obtaining of a decision by the officials of the Land Department by means of imposition *upon them* through false swearing as sufficient ground for reviewing their action.

In the opinion of the Court below reference is made to the decision of this Court in United States *vs.* Throckmorton, 98 U. S., 61, and quotation is made from that decision, of the paragraph wherein it is held that the matter of fraud for which a bill to set aside a judgment between the same parties will be sustained, are those which are extrinsic or collateral to the matter tried and not a fraud which was in issue in the former suit. This case serves well to illustrate the distinction we are attempting to draw between a proceeding to correct or set aside a decision of the Land Department because of fraud or imposition *practiced upon the land officials,* and a bill to review the decision of a Court of competent jurisdiction. In the case cited and relied upon by the Court below, the matter that was in issue in the case as it came to this Court was a decree rendered by the District Court of the United States for Southern California affirming a decree of the Board of Commissioners of Private Land Claims

which confirmed a certain private claim set up by one Richardson. In that case appeal was taken from the Board of Commissioners to the District Court under the statute and the case tried by the Court. From the decision of the District Court affirming the conclusion of the Commissioner, further appeal was taken to this Court where, after it had remained for a year on the docket, the Attorney-General dismissed the appeal. Nearly twenty years later suit was brought by the District Attorney for Southern California in the name of the United States against Throckmorton. It will be seen at once that that case did not involve a decision of the Land Department, but a decision of a Court which had been allowed to stand unchallenged for twenty years. The very case next cited by the Court below, of Baldwin *vs.* Stark, 107 U. S., 463, sustains our contention. In the Throckmorton case it was held that the fraud or imposition on account of which relief would be granted, must be some imposition *practiced upon the unsuccessful party.* While in the very language quoted from the case of Baldwin *vs.* Stark, *supra,* in the opinion of the lower Court (Record, p. 144), it was said, in reference to a decision by the Land Department:

> "Where fraud *or imposition* has been practiced on the party interested *or on the officers of the law,* or where these latter have clearly mistaken the law of the case as applicable to the facts, Courts of Equity may give relief."

And these rulings quoted by the lower Court dispose of the suggestion that the matter which constituted the ground of complaint must be *extrinsic* or collateral to the main issue that was tried and not *intrinsic* or a matter which might have been placed in issue in the proceedings sought to be reviewed. This Court has expressly declared that relief will be granted as against an issue obtained by im-

position, through false testimony, upon the land officials. This must necessarily have relation to testimony offered in support of an issue which was being tried or which might have been tried in the tribunal rendering the decision complained of.

It is suggested in the opinion of the Court below that appellant has not alleged that he has evidence at hand to prove his allegations, but we submit that no rule of pleading requires any such allegation in a bill or complaint. The pleader, if he proceeds according to the correct rules of pleading, sets up specifically the facts upon which he relies. If those facts are sufficient to entitle him to relief, he is entitled then to a trial and the opportunity to esablish his allegations by evidence. The demurrer admits the truth of the allegations of the petition and it would be illogical in the extreme to hold, in ruling upon a demurrer which admits the truth of the allegations, that the allegations admitted to be true by the demurrer are not sufficient because the pleader has not stated that he can prove such admitted allegations.

Upon the whole case it seems clear that the amended petition presents such a case of imposition practiced upon the officials of the Land Department, which was brought to their attention, but which they refused to investigate, as to entitle appellant to a trial in a Court of Equity, and we ask that the decision below be reversed.

Respectfully submitted,

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